Siti Shamsiyah Ab Karim & Ors v Melombong & Perumahan Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–823 OF 2003
NIK HASMAT JC
5 MARCH 2012

Companies and Corporations — Separate legal entity — Holding and subsidiary companies — Parent or holding and subsidiary company — First defendant described as subsidiary of second defendant — Second defendant represented as principal party in development of project — Whether second defendant liable for representations made by first defendant — Whether second defendant privy to contract and proper party to plaintiffs' cause of action — Whether second defendant liable for representations made by second defendant's agent, first defendant

Contract Law — Agreement — Sale and purchase — Breach of — Failure to deliver luxury condominiums — Misrepresentation — Condominium units not build in accordance with defendant's representation — Whether breach of contractual terms and collateral representation — Privy to contract — Whether first defendant an agent for second defendant — Whether second defendant liable for representations made by first defendant — Whether there was locus standi — Whether plaintiffs succeeded in proving claim

The plaintiffs were purchasers of condominium units in a housing development project known as Ampang Ultima ('the project'). The plaintiffs entered into the sales and purchase agreements ('SPA') with the first defendant, the developer for the project, for the purchase of the condominium units as stated in the First Schedule of the SPA. In advertisements relating to the project, the first defendant was described as a subsidiary of Talam Corp Bhd, the second defendant, which was listed on the KLSE Main Board and had represented the second defendant as the principal party in the development of the project and that the project was managed by second defendant. The plaintiffs asserted that they had purchased the condominium units based on the defendants' advertisements which stated that the project development was managed by the second defendant and that the units were to be built in accordance with the defendants' representation to the plaintiffs of the project development as 'big, deluxe and luxurious'. Upon completion of the project and delivery of the vacant possession, the plaintiffs discovered that the units delivered to them were of low to medium cost standards. Further, the units delivered to the plaintiffs did not conform to the defendants' representation of the units and that it contained numerous defects, defective workmanship and

was inconsistent with the description and specification provided in Schedule 4 of the SPA. The plaintiffs herein alleged that the defendants had breached the SPA the consequences of which the plaintiffs had suffered loss and damage and thus claimed inter alia, general damages against the second defendant. The second defendant however, contended that the plaintiffs did not have any locus standi in the plaintiffs cause of action as the second defendant was not a party to the contract executed between the plaintiffs and their subsidiary, the first defendant. They further contended that both parties had entered into the SPA on a 'willing buyer and willing seller' basis and that the condominium units were constructed, completed and delivered to the plaintiffs in accordance with the defendants' representation and, the description stated in the said SPA.

Held, allowing the plaintiffs' claim with costs, and damages to be assessed:

(1) Despite not being the contracting party to the SPA, the second defendant through various advertisements of the project had consistently held out and represented to the plaintiffs that the said condominium project was their project and had further represented that the project would be managed by the second defendant. Thus, although it is trite that, a party who is not a party to a contract has no right to sue in contract, and despite the plaintiffs' execution of the SPA being with the second defendant's subsidiary, the second defendant was privy and accordingly, a proper party to the plaintiffs' cause of action (see para 7).

(2) The second defendant was clearly and undisputedly, a reputable housing developer and a leading player in the nation's housing development industry. The defendant's advertisements as represented to the plaintiffs that the second defendant, a public listed company on the KLSE Main Board, would be the party responsible for the development and management of the first defendant's housing project. Being a subsidiary of the second defendant, the first defendant was clearly managed and controlled by the second defendant and that the second defendant as the first defendant's holding company was actively involved in the business activities of the first defendant. Thus, notwithstanding that the second defendant owed a separate existence from their subsidiary, the first defendant, the second defendant was liable for the representations made by second defendant's agent, the first defendant, which induced the plaintiffs to execute the SPA (see paras 8–10).

(3) The second defendant clearly breached cl 12 of the SPA between the purchasers and the first defendant. The defendants had failed to deliver the luxury condominium as promised to their purchasers. The units delivered did not conform to the defendants' representation and constituted a fundamental departure from what was represented to the plaintiffs. Further, the defendants' erroneous, inaccurate and overt representation of the project imposed clear legal liability on the

defendants as defendants' representation encouraged and induced the plaintiffs into their respective purchases. There was thus, a clear failure on the part of the first defendant to construct and deliver to the plaintiff the units in accordance to the specification as described in Schedule 4 of the SPA and in accordance with the second defendant's representation of the project in brochures and advertisements (see paras 14–15).

(4) Further, based on the testimony of the architect for the project, DW5, and the second defendant's building plan in exh L2, the project was originally approved as a medium cost apartment and, not as a luxurious condominium project that had been promised and consistently represented to the plaintiffs. The plaintiffs were not alerted of the changes in the building plan description and specification which had reduced the quality and standard of the project development from that of a big, deluxe, and luxurious condominium to a medium cost apartment. The plans were not shown to the purchasers and the plaintiffs did not possess any knowledge of the defendants' amended building plans (see paras 16–17).

(5) As the plaintiffs were unable to secure the plans from the defendants, the plaintiffs requested from the approving authority for copies of the project's building plans, P3. The second defendant could not challenge to verify the authenticity of P3 and accordingly accepted P3 as proof of the second defendant's deviation from the project description. Accordingly, the second defendant was liable to the plaintiffs for the breach of the contractual terms pursuant to the said SPA and the breach of collateral representation made to the plaintiffs (see para 19).

(6) It was reasonable for the court to infer that the plaintiffs did not have any knowledge that the approved building plan did not correspond with the defendants' description and representation to the plaintiffs as contained in their brochures, pamphlets and advertisements. Accordingly, the defendant was liable to the plaintiffs for the breach of contractual terms pursuant to the said SPA, and the breach of collateral representation made to the plaintiffs to construct and deliver condominium units with superior finishes, fittings and workmanship befitting the description as a luxury condominium project. Hence, the second defendant as the holding company of first defendant was legally liable to the plaintiffs with the first defendant, for the representation made to the plaintiffs in respect of the sale of the condominium units and their project development (see paras 20–21).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan pembeli-pembeli unit-unit kondominium di sebuah projek pembangunan perumahan yang dikenali sebagai Ampang Ultima ('projek'). Plaintif-plaintif memeterai perjanjian jual dan beli ('PJB')

dengan defendan pertama, pemaju untuk projek tersebut, untuk pembelian unit-unit seperti yang dinyatakan di dalam Jadual Pertama PJB. Di dalam iklan-iklan mengenai projek tersebut, defendan pertama dinyatakan sebagai satu subsidiari kepada Talam Corp Bhd, defendan kedua, yang disenaraikan di Papan Utama BSKL dan telah mewakili defendan kedua sebagai pihak utama dalam pembangunan projek tersebut dan bahawa projek tersebut diuruskan oleh defendan kedua. Plaintif-plaintif menegaskan bahawa mereka membeli unit-unit kondominium berdasarkan iklan-iklan defendan yang menyatakan bahawa projek pembangunan tersebut diuruskan oleh defendan kedua dan bahawa unit-unit yang akan dibina, menurut representasi defendan-defendan mengenai projek pembangunan tersebut kepada plaintif-plaintif sebagai 'besar, menarik dan mewah'. Selepas projek tersebut siap dan penyerahan milikan kosong, plaintif-plaintif mendapati bahawa unit-unit yang diserahkan kepada mereka berpiawaian kos rendah hingga sederhana. Selanjutnya, unit-unit yang diserahkan kepada plaintif-plaintif tidak menepati representasi unit defendan-defendan dan bahawa ia mempunyai banyak kecacatan, mutu kerja yang teruk dan tidak konsisten dengan deskripsi dan spesifikasi yang dinyatakan dalam Jadual 4 PJB. Plaintif-plaintif di sini mendakwa bahawa defendan-defendan telah melanggar PJB yang mengakibatkan plaintif-plaintif mengalami kerugian dan kerosakan dan oleh itu menuntut, antara lainnya, ganti rugi am terhadap defendan kedua. Defendan kedua bagaimanapun, menghujah bahawa plaintif-plaintif tidak mempunyai locus standi dalam kausa tindakan plaintif-plaintif memandangkan defendan kedua bukan merupakan pihak kepada kontrak yang dimeterai antara plaintif-plaintif dan subsidiari mereka, defendan pertama. Mereka seterusnya menghujah bahawa kedua-dua pihak memeterai PJB atas dasar 'pembeli bersanggupan dan penjual bersanggupan' dan bahawa unit-unit kondominium dibina, disiapkan dan diserahkan kepada plaintif-plaintif menurut representasi defendan-defendan dan deskripsi yang dinyatakan dalam PJB tersebut.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan ganti rugi ditaksir:

(1) Walaupun bukan merupakan pihak kontrak kepada PJB, defendan kedua melalui beberapa iklan projek tersebut, secara konsisten menyatakan dan memberi representasi kepada plaintif-plaintif bahawa projek kondominium merupakan projek mereka dan sekali gus memberi representasi bahawa projek tersebut akan diuruskan oleh defendan kedua. Oleh itu, walaupun diketahui bahawa satu pihak yang bukan merupakan pihak kepada kontrak tidak mempunyai hak untuk menyaman di dalam kontrak dan walaupun plaintif-plaintif memeterai PJB dengan subsidiari defendan kedua, defendan kedua merupakan privi dan dengan ini, merupakan pihak sepatutnya kepada kausa tindakan plaintif-plaintif (lihat perenggan 17).

(2) Defendan kedua dengan jelas dan tanpa disangkal, merupakan sebuah

pemaju perumahan yang mempunyai reputasi dan pemain utama dalam industri pembangunan perumahan negara. Iklan-iklan defendan seperti yang direpresentasikan kepada plaintif-plaintif ialah bahawa defendan kedua, sebuah syarikat awam yang berada di Papan Utama BSKL, merupakan pihak yang bertanggungjawab untuk pembangunan dan pengurusan projek defendan pertama. Sebagai subsidiari kepada defendan kedua, defendan pertama secara jelasnya diuruskan dan dikawal oleh defendan kedua dan bahawa defendan kedua sebagai syarikat induk defendan pertama secara aktif terbabit dalam aktiviti-aktiviti perniagaan defendan pertama. Oleh itu, meskipun defendan kedua wujud berasingan daripada subsidiari mereka, defendan pertama, defendan kedua bertanggungan untuk representasi-representasi yang dibuat oleh ejen defendan kedua, defendan pertama, yang menyebabkan plaintif-plaintif memeterai PJB (lihat perenggan 8–10).

(3) Defendan kedua dengan jelas melanggar klausa 12 PJB antara pembeli-pembeli dan defendan pertama. Defendan-defendan gagal untuk menyerahkan kondominium mewah seperti yang dijanjikan kepada pembeli-pembeli mereka. Unit-unit yang diserahkan tidak menepati representasi defendan-defendan dan merupakan satu lencongan utama daripada apa yang direpresentasikan kepada plaintif-plaintif. Selanjutnya, representasi salah, tidak tepat dan terang-terangan oleh defendan-defendan mengenai projek tersebut memberikan liabiliti jelas di sisi undang-undang ke atas defendan-defendan memandangkan representasi defendan-defendan menggalakkan dan menyebabkan plaintif-plaintif membuat pembelian masing-masing. Oleh itu terdapat, satu kegagalan nyata bagi pihak defendan pertama untuk membina dan menyerahkan kepada plaintif-plaintif unit-unit menurut spesifikasi seperti yang dinyatakan dalam Jadual 4 PJB dan menurut representasi defendan kedua mengenai projek tersebut di dalam brosur-brosur dan iklan-iklan (lihat perenggan 14–15).

(4) Seterusnya, berdasarkan keterangan arkitek untuk projek tersebut, DW5, dan pelan bangunan defendan kedua dalam eksibit L2, projek tersebut pada asalnya diluluskan sebagai pangsapuri kos sederhana dan bukannya projek kondominium mewah seperti yang telah dijanjikan dan secara konsisten direpresentasikan kepada plaintif-plaintif. Plaintif-plaintif tidak diberitahu mengenai perubahan di dalam pelan deskripsi bangunan dan spesifikasi yang mengurangkan kualiti dan piawaian pembangunan projek daripada kondominium besar, menarik dan mewah kepada sebuah pangsapuri kos sederhana. Pelan-pelan tersebut tidak ditunjukkan kepada pembeli-pembeli dan plainti-plaintif tidak mengetahui tentang pelan bangunan terpinda defendan-defendan (lihat perenggan 16–17).

(5) Memandangkan plaintif-plaintif tidak berjaya mendapatkan pelan-pelan daripada defendan-defendan, plaintif-plaintif memohon daripada pihak berkuasa yang memberi kelulusan untuk salinan-salinan pelan bangunan projek, P3. Defendan kedua tidak boleh mencabar untuk memastikan kesahihan P3 dan dengan itu, menerima P3 sebagai bukti perlencongan defendan kedua daripada deskripsi projek. Berikutan dengan itu, defendan kedua bertanggungan kepada plaintif-plaintif untuk pelanggaran terma-terma kontrak menurut PJB tersebut dan pelanggaran representasi kolateral yang dibuat kepada plaintif-plaintif (lihat perenggan 19).

(6) Adalah munasabah untuk mahkamah mengandaikan bahawa plaintif-plaintif tidak mengetahui bahawa pelan bangunan yang diluluskan tidak sama dengan deskripsi dan representasi defendan-defendan kepada plaintif-plaintif seperti yang terkandung di dalam brosur-brosur, risalah-risalah dan iklan-iklan mereka. Dengan itu, defendan bertanggungan kepada plaintif-plaintif untuk pelanggaran terma-terma kontrak menurut PJB tersebut dan pelanggaran representasi kolateral yang dibuat kepada plaintif-plaintif untuk membina dan menyerahkan unit-unit kondominium dengan kemasan berkualiti, kelengkapan dan hasil kerja yang menepati deskripsi sebagai sebuah projek kondominium mewah. Oleh itu, defendan kedua sebagai syarikat induk defendan pertama bertanggungan di sisi undang-undang kepada plaintif-plaintif dengan defendan pertama untuk representasi yang dibuat kepada plaintif-plaintif mengenai penjualan unit-unit kondominium dan pembangunan projek mereka (lihat perenggan 20–21).]

Notes

For a case on sale and purchase, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2828.

For cases on holding and subsidiary companies, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 856–861.

Cases referred to

Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109; [1979] 1 LNS 32 (refd)

Len Min Kong v United Malayan Banking Corp Bhd and another appeal [1998] 2 MLJ 478; [1998] 2 CLJ 879, CA (refd)

DP Vijandran (DP Vijandran & Co) for the plaintiff.

Ricky Tan (Marcus Chan with him) (Ricky Tan & Co) for the second defendant.

Nik Hasmat JC:

BACKGROUND FACTS

[1] The plaintiffs are the purchasers of condominium units in a housing development project known as Ampang Ultima of which upon the completion of the project is known as Ampang Damai. The plaintiffs for the period between 1997–2001 had entered into the sales and purchase agreements with the developer for the project, the first defendant, for the purchase of the condominium units on the dates and purchase prices ranging from RM119,880–RM178,400 as stated in the first schedule of 'the SPA'. The project was initially advertised by the first defendant as a condominium project but subsequently, since 1999 was advertised as 'deluxe, big luxurious condominiums'. In advertisements relating to the project, the first defendant was described as 'a subsidiary of the second defendant, Talam Corporation Bhd, listed on the KLSE Main Board'. The defendants in their advertisements of the project had represented the second defendant as the principal party in the development of the project and that the project was managed by second defendant.

[2] The plaintiffs assert that the plaintiffs' purchase of the condominium units were based on the defendants advertisements which stated that the project development was 'backed up' by the second defendant and that the units were to be built in accordance with the defendants' representation to the plaintiffs of the project development as 'big, deluxe and luxurious condominium'.

[3] Upon completion of the project and delivery of the vacant possession, the plaintiffs however discovered that the units delivered to the plaintiffs were of low to medium cost apartments. The units delivered to the plaintiffs did not conform to the defendants' representation of the units and contained numerous defects, defective workmanship and, generally inconsistent with the description and specification provided in Schedule 4 of the SPA. The plaintiffs thus alleged that the defendants had breached the SPA as the defendants failed to build and deliver condominium with material, finishes, fittings and workmanship which conform to the defendants' representation of the project.

[4] As a consequence of the defendants' aforesaid breaches, the plaintiffs suffered loss and damages and claimed against the second defendant, general damages, interests at the rate of 8%pa on the general damages from date of the order to the date of full realisation and costs as specified in para 21(a)–(d) of the plaintiff's statement of claim.

THE SECOND DEFENDANT'S DEFENCES

[5] The second defendant contend that the plaintiffs do not have any locus standi in the plaintiffs cause of action as the second defendant is not a party to the contract which was executed between the plaintiffs and their subsidiary, the first defendant. The second defendant deny that the plaintiffs' purchase of the condominium units were based on second defendants' representation and further denied all of the plaintiffs' assertion as contained in para 20 of the plaintiffs' statement of claim. The second defendant contend that both parties had entered 'the SPA' on a 'willing buyer and willing seller' basis and that the condominium units were constructed, completed and delivered to the plaintiffs in accordance with the defendants' representation and, the description stated in 'the said SPA'.

JUDGMENT

[6] Based on oral and documentary evidence and written submissions from counsels for both parties, the court finds that the plaintiffs on a balance of probabilities have succeeded to prove the plaintiffs' case against the second defendant. Accordingly, the plaintiffs' claim for general damages in para 21 of the plaintiffs' summons and statement of claim is allowed with interests and costs with damages to be assessed.

GROUNDS OF JUDGMENT

[7] It is clear to the court that in respect of the purchase of the condominium units, the plaintiffs had executed 'the SPA' with the first defendant and not the second defendant. However despite not being the contracting party to 'the SPA', the second defendant through various advertisements of the project as exhibited in exh P5 had consistently held out and represented to the plaintiffs that the Bandar Baru Ampang Deluxe Condominium Project was the second defendant's project and had further represented that the project which was developed by their subsidiary, the first defendant would be managed by the second defendant. Thus, although it is trite that, a party who is not a party to a contract has no right to sue on contract, and despite the plaintiffs' execution of the SPA was with the second defendant's subsidiary, the court finds that the second defendant is privy and accordingly, is a proper party to the plaintiffs' cause of action.

[8] The defendant's advertisements as represented to the plaintiffs was that the second defendant being a public listed company which is listed on the KLSE Main Board, would be the party responsible for the development and management of the first defendant's housing project. In this regard, the defendant's witness DW3 had confirmed in court that the second defendant is responsible for the project as stated in the defendants project's advertisements. It is also clear to the court that at the material time, the second defendant was clearly and undisputedly, a reputable housing developer and a leading player in the nation's housing development industry. Further, PW2 and DW3 confirmed in court that the second defendant is a public listed company in the KLSE Main Board and that being a subsidiary of the second defendant, the first defendant company is merely an agent of the second defendant.

[9] Based on the clear content of exh P11 and P12, it is clear to the court that first defendant as the subsidiary of the second defendant is clearly managed and controlled by the second defendant and that the second defendant as the first defendant's holding company is actively involved in the business activities of the first defendant. PW2's testimony of the second defendant's relationship, management and control over the first defendant is corroborated by documentary proof namely the company search report on the first defendant and second defendant's annual reports for the years 1998–2000 and 2005 as exhibited in P7, which clearly listed the Bandar Baru Ampang Housing Project as the second defendant's project. In the second defendant's annual report of 2003, exh P8, under the classification heading of 'list of properties', the second defendant is stated as the registered owner of the first defendant and in the 'Edge Malaysia' magazine in exh P10A, the second defendant has included the housing project as one of their project.

[10] Based on the second defendant's annual report of 2003 (exh D9), the first defendant is evidently a part of the corporate structure of the second defendant where the second defendant is stated to hold 92.2% of the first defendant's shares which effectively render the first defendant a wholly owned company of the second defendant. It is thus clear to the court that the first defendant whose principal activities are property development is a wholly owned subsidiary of the second defendant. In this regard it is trite that despite their separate existence, the first defendant as a subsidiary company of the second defendant may be regarded as an agent of the parent company, based on the principle decided in the case of *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 190; [1979] 1 LNS 32. When dealing with the rule on corporate personality, Salleh Abas FC:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has in a number of cases, bypassed this principle, if not made inroads into it. The court seemed quite willing to lift 'the veil of incorporation' (so the expression goes) when the justice of the case so demands. Thus the facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or vice versa …

[11] Thus, notwithstanding that the second defendant owe separate existence from their subsidiary the first defendant, as the first defendant and the first defendant's project development is clearly managed and controlled by the holding company the second defendant, the court accordingly, finds the second defendant liable for the representations made by the second defendant's agent, the first defendant which induced the plaintiffs to execute the SPA.

[12] It is further clear to the court that in the purchase of the condominium units, the plaintiffs were sufficiently induced and had significantly relied on the defendants' advertisements that stated the first defendant, 'a subsidiary of Talam Corporation Bhd (1120-H) (Listed on the KLSE Main Board) as the developer for the project as in exh P4. In this regard, the second defendant had however contended that 41 out of 69 of the plaintiffs could not have been induced into the purchase of the condominium units, as the sales and purchase agreements were executed prior to the advertisements referred to in exh P5. It was further submitted by the defendant that PW2 could not give evidence for the 68 plaintiffs as he had no knowledge of the actual representation made by the defendant, particularly as five of the plaintiffs have disposed their units and no longer has the locus standi in the plaintiffs' claim.

[13] In this regard, PW2, who gave evidence on behalf of other purchasers, confirmed in court that he had signed and executed the SPA with the first defendant based on the defendants' representation that the project was wholly backed up by the second defendant. PW2 stated that he saw the advertisements of the project in the newspapers which clearly stated the first defendant as a subsidiary of the second defendant and that the project is managed by the second defendant. According to PW2, when he went to the second defendant's office to sign the letter of offer, he was pointed out by the sales representative of the defendants to the brochures and wall displays which stated the project as that of the second defendant. PW2 confirmed that he was further assured by

the second defendant's sales representatives that the second defendant was responsible for the first defendant's project. PW2 further confirmed that the plaintiffs would not have entered the SPA with the first defendant without the second defendant's representation that the second defendant would be responsible for the project. The court thus finds that in the purchase of the condominium units, the plaintiffs had relied and were sufficiently induced by the second defendant's representation. The second defendant is thus accordingly liable to the plaintiffs for their failure to build and deliver to the plaintiffs the condominium units in accordance with the specification, collateral assurances and representation to the plaintiffs.

[14] The second defendant clearly breached cl 12 of the SPA which were executed between the purchasers and the first defendant during the period of 1997–2001. According to the SPA, the first defendant had agreed to build the condominium units in accordance with the plans and specification as stated in the Schedule 14. Based on the testimony of PW2 the plaintiffs had relied on the defendant's advertisements dated 4 December 1999, 5 May 2000, 29 July 2000, 13 January 2001 and 20 January 2001, in their purchase of the condominium units, as exhibited in exh P5. Based on the evidence of PW1 and PW1's report as in P2, it is clear to the court that the defendants had failed to deliver a luxury condominium as was promised to their purchasers and that the units delivered did not conform to the defendants' representation and constitute a fundamental departure from what was represented to the purchaser plaintiffs. The construction of the condominium clearly did not conform to the plans and specification that were represented by the defendants to their purchasers as contained in Schedule 4 of the SPA. Further, the defendants' erroneous, inaccurate and overt representation of the project imposed clear legal liability on the defendants as defendants' representation encouraged and induced the plaintiffs into their respective purchases. In the case of *Len Min Kong v United Malayan Banking Corp Bhd and another appeal* [1998] 2 MLJ 478; [1998] 2 CLJ 879, the Court of Appeal relied on the judgment of Raja Azlan Shah CJ Malaya and quoted as follows:

> In our view those cases are strong authority for the preposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement ….

[15] There was thus, a clear failure on the part of the first defendant to construct and deliver to the plaintiff the units in accordance to the specification as described in Schedule 4 of the SPA and in accordance with the second defendant's representation of the project in brochures and advertisements. Based on the testimony of PW1 and report which contained list of defects as in exh P2, it is clear that the defendants did not comply with the specification that had been represented to the plaintiffs in the defendants' advertisements. PW1's clear and unwavering testimony on the non-compliance and inconsistencies with the prescribed specification as described in his report in exh P2, confirmed the defendants' departure and non-compliance from the specification as stated in the original approved building plan exhibited in P3.

[16] In this regard, PW2 confirmed in court that the approved building plan for the project is the plan exhibited in P3, which was officially obtained after the completion of the construction of the project, on 8 March 2002 from the approving authority, the Majlis Perbandaran Ampang Jaya. Further, based on the testimony of the architect for the project, DW5, and the second defendant's building plan in exh L2, it is confirmed that the project was originally approved as a medium cost apartment and, not as a luxurious condominium project. DW5 concede in court that the amended building plan as in L2 had reduced the quality of the condominium units from a 'deluxe, big, luxurious condominium' to, 'Rumah Pangsa Sederhana/Medium Cost Apartment'.

[17] It is therefore clear to the court that based on the amended building plan of L2 as was produced by the defendants' own architect, the plans were clearly intended for the construction of medium cost apartment and not the luxurious condominium units that had been promised and consistently represented to the plaintiffs. Further, DW5 had confirmed in court that there was no reduction in the quality of workmanship but DW5 however concede that the second defendant's amended building plans as in exh L2 had reduced the quality and standard of the project from a luxurious condominium to a medium cost apartment.

[18] The court therefore accepts the plaintiff's contention that the project was based on the original approved plan for the project as approved in 1991 and exhibited in P3, which had formed the basis of the defendant's representation to the plaintiffs. The plans were clearly made prior to the defendants' amended plan in L2 and were clearly the only original plan provided by the approving authority for the project, the MPAJ. The approved plans as in exh P3 is consistent with the plaintiffs' assertion of the defendants erroneous representation that the second defendant's project development is that of a luxurious condominium with superior fittings and workmanship.

[19] In this regard, despite the production of the defendants' amended building plans by the second defendant's architect, DW5, it is clear to the court that the plaintiffs' and the plaintiffs' solicitor were informed of the existence of the aforesaid amended building plans. The plaintiffs were not alerted of the changes in the building plan description and specification which had reduced the quality and standard of the project development from that of a big, deluxe, and luxurious condominium to a medium cost apartment. As conceded by DW4, the plans were not shown to the purchasers and the plaintiffs did not possess any knowledge of the defendants' amended building plans. It was further confirmed by PW2 that the plaintiffs had approached the defendants for the plans and, as confirmed by DW4 the defendants had refused and or failed to furnish such plans. As the plaintiffs were unable to secure such plans from the defendants, the plaintiffs requested from the approving authority for copies of the project's building plans as in P3. The court accordingly dismisses defendants' challenge to verify the authenticity of P3 and accordingly accepts P3 as proof of the second defendant's deviation from the project description.

[20] It is reasonable for the court to infer that the plaintiffs did not have any knowledge that the approved building plan in respect of the defendants' project did not correspond with the defendants' description and representation to the plaintiffs as contained in their brochures, pamphlets and advertisements. Accordingly, the defendant is liable to the plaintiffs for the breach of the contractual terms pursuant to the SPA, and the breach of collateral representation made to the plaintiffs to construct and deliver condominium units with superior finishes, fittings and workmanship befitting the description as luxury condominium project.

[21] Therefore, based on the reasons alluded to above, the court is of the view that the plaintiffs succeeded to prove their claim against the second defendant on a balance of probabilities and accordingly allowed the plaintiff's claim in para 21 of the plaintiff's statement of claim. The plaintiffs succeeded to prove that based on the oral and documentary evidence adduced before the court, the second defendant as the holding company of first defendant is legally liable to the plaintiffs with the first defendant for the representation made to the plaintiffs in respect of the sale of the condominium units and their project development.

[22] As to the assessment of damages, the court noted that PW1's report as in exh P2 contained guidelines and basis for the computation and assessment of

damages which is fundamentally premised on the original building plan produced by the plaintiffs, as exhibited in exh P3. Accordingly, the court ordered for general damages to be assessed.

Plaintiffs' claim allowed with costs, and damages to be assessed.

Reported by Ashgar Ali Ali Mohamed